Supreme Court, U.S.
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No. 92-1394

In the Supreme Court of the United States

OCTOBER TERM, 1992

EL VOCERO DE PUERTO RICO
CARIBBEAN INTERNATIONAL NEWS CORP.
TOMAS DE JESUS MANGUAL,
PETITIONERS,

v.

CARMEN LUCILA DOMINGUEZ ORSINI
AND OTHERS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

RESPONDENTS' BRIEF IN OPPOSITION

JORGE E. PEREZ
P.O. Box 191746
San Juan, PR 00919-1746
(809) 793-4998
Counsel for Respondents

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QUESTION PRESENTED

1. Whether the Resolutions of the Supreme Court of the Commonwealth of Puerto Rico presented for review in the present Petition for Writ of Certiorari are a final judgment for purposes of 28 U.S.C. sec. 1258 thus providing jurisdiction to the Supreme Court of the United States.

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AND OTHERS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Carmen Lucila Dominguez Orsini, Enrique Martinez Dominguez, Elsa Maria Maldonado Rodriguez, Raul Martinez Dominguez, Oraida Munoz Santiago, Carlos Luis Martinez Dominguez, Carmen Lucila Dominguez Vazquez, Carmen Martinez Bayo, Luz Maria Martinez Bayo, Ana Selenia Dominguez Orsini, Irene Dominguez Orsini, Lourdes del Carmen Martinez Negron, Jackeline Martinez Negron, Ileana Martinez Maldonado, Lymari Martinez Maldonado, Irelys Martinez Munoz, and Oraidalys Martinez Munoz, respectfully request that this Court deny the petition for writ or certiorari seeking review of two resolutions of the Supreme Court of the Commonwealth of Puerto Rico, dated respectively November 13, 1992 and December 18, 1992. Certified translations of both resolutions are reproduced in petitioners' appendix at pages 16 and 17.

I. Jurisdiction

Petitioners invoke jurisdiction pursuant to 28 U.S.C. sec. 1258 which provides for the review by this Court of final judgments or decrees of the Supreme Court of Puerto Rico. As argued in detail below, however, this Court lacks jurisdiction in this case since there is no final judgment or decree of the Supreme Court of Puerto Rico.

II. Statement Of The Case

On May 2, 1990, respondents in this case filed a tort suit against petitioners, El Vocero de Puerto Rico and Tomas de Jesus Mangual, as well as against WUNO, a local radio station. They alleged in essence that the defendants had published false and injurious information about a deceased relative and that as a result of said action they had suffered serious damages. On January 18, 1991, defendants El Vocero de Puerto Rico and Tomas de Jesus Mangual — petitioners in this case — filed a motion to dismiss pursuant to Rule 10.3 of the Puerto Rico Rules of Civil Procedure. P.R. Laws Ann., T. 32. Through resolution of March 19, 1992, the trial Court, the Superior Court of Puerto Rico, Ponce Part, denied the motion.[1]

Thereafter, on April 2, 1992, petitioners sought review before the Supreme Court of Puerto Rico of the resolution of the Superior Court denying their motion to dismiss. They did so by filing an appeal and a petition for writ of certiorari pursuant to Articles 14(a) and (f) of the Judicial Act of Puerto Rico, P.R. Laws Ann., T. 4, § 37 (a)(f) (1980).

On November 13, 1992, the Supreme Court of Puerto Rico denied the appeal since only certain final judgments of Superior Court are appealable to the Supreme Court of Puerto

[1] A translation of the Superior Court resolution is included in the Appendix to the Petition for Writ of Certiorari, pages 1-15.

Rico and, of course, petitioners were seeking review of an interlocutory matter. *See* App. to Pet. at 16. As to the petition for writ of certiorari, the Supreme Court denied it "at this stage of the proceedings". *Id.*[2] Petitioners requested reconsideration of the November 13, 1992 resolution and through resolution of December 18, 1992, the Supreme Court denied it[3]. In this case petitioners seek review by the Supreme Court of the United States of both the November 13, 1992 and the December 18, 1992 resolutions of the Supreme Court of Puerto Rico.

III. Reason Why The Petition Should Be Denied

THIS COURT LACKS JURISDICTION TO REVIEW THE RESOLUTIONS OF THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO PRESENTED FOR REVIEW IN THE PETITION FOR WRIT OF CERTIORARI.

The Jurisdiction in this case is sought invoking 28 U.S.C. sec. 1258, which provides for the review by this Court through writ of certiorari of "final judgments and decrees rendered by the Supreme Court of Puerto Rico." *See* 28 U.S.C. sec. 1258.[4]

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[2] At the time, interlocutory decisions of the Superior Court were reviewable by the Supreme Court of Puerto Rico "through certiorari to be issued at its discretion and not otherwise". *See*, P.R. Laws Ann., T. 4, § 37(f) (1980). The Judicial Act was later amended to add an intermediate Appeals Court. This new Court of Appeals now reviews through certiorari interlocutory decisions of the Superior Court. These decisions are in turn reviewable by the Supreme Court of Puerto Rico also by certiorari. See Act No. 21 of July 13, 1992.

[3] A certified translation of this resolution is included in the Appendix to the Petition for Writ of Certiorari, at page 17.

[4] 28 U.S.C. sec. 1257, which provides jurisdiction to review "final judgments or decrees rendered by the highest court of a State in which a decision could be had" is identical to 28 U.S.C. sec. 1258 which provides the same authority in cases decided by the Supreme Court of the Commonwealth of Puerto Rico. Therefore, decision of this Court regarding 28 U.S.C. sec. 1257 control controversies which, as in this case, arise from 28 U.S.C. sec. 1258. *See, e.g., Posadas de Puerto Rico* v. *Tourism Co.*, 478 U.S. 328, 338 (1986).

It is not even arguable that the resolutions in question in this case are *not* final judgments of the Supreme Court of Puerto Rico. Therefore, it is likewise not even arguable that this Court lacks jurisdiction in this case.

The general rule is that the final judgment requirement "precludes reviewability where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State". *Radio Station WOW Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945); *See also*, *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 47 (1987); *Flynt* v. *Ohio*, 451 U.S. 619, 620 (1981).

In essence, to meet the final judgment requirement, the decision to be reviewed by the Supreme Court of the United States must be "the final word of a final court". *Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, 551 (1945); *See also*, R.L. Stern, E. Gressman & S.M. Shapiro, *Supreme Court Practice*, 120-122 (6th Ed. 1986).

In this case, further substantive proceedings in the courts of the Commonwealth of Puerto Rico must be had before a decision on the case can be said to be the final word of the Supreme Court of Puerto Rico.

As stated before, petitioners seek review by this Court of two resolutions issued by the Supreme Court of Puerto Rico. The first resolution, dated November 13, 1992, is a denial by the Puerto Rico Supreme Court to review through certiorari, at that time of the proceedings, a decision of the Superior Court of Puerto Rico denying a motion to dismiss the complaint filed by petitioners pursuant to Rule 10.3 of Puerto Rico Rules of Civil Procedure. This request was, of course, for a review of an interlocutory decision of the Superior Court, which at the time could be reviewed by the Supreme Court of Puerto Rico "through certiorari to be issued at its discretion". P.R. Laws Ann., T. 4, § 37(f)[5]. The second resolution

[5] See note 2, *supra*.

presented to this Court in this case is merely a denial to reconsider the first resolution.

These denials by the Supreme Court of Puerto Rico are not a decision on the merits of the case; rather, these denials mean nothing more than the fact that the Supreme Court of Puerto Rico has exercised its discretion of not reviewing an interlocutory matter at that stage of the proceedings. *Sociedad Legal de Gananciales* v. *Pauneto Rivera* 92 JTS 78, pp. 9593, 9596 (Supreme Court of Puerto Rico, June 17, 1992)[6]. Hence, several substantive proceedings were, and continue to be, pending or available at the courts of the Commonwealth of Puerto Rico. The Superior Court has yet to issue a final judgment in the case. Moreover, once this occurs, the losing party can either file a writ of review or an appeal before the Supreme Court of Puerto Rico seeking review of the Superior Court judgment. P.R. Laws Ann., T. 4, § 37(a)(b)[7]. On this new occasion the petitioner can once more present his federal question to the Supreme Court of Puerto Rico, as well as any other issue properly before the Court. *Sociedad Legal de Gananciales* v. *Pauneto Rivera*, 92 JTS 78 at 9596 (see Appendix at 17-18). Only after this occurs, that is, until the matter is again presented to the Supreme Court of Puerto Rico after a final judgment of the trial court and the Supreme Court decides the case, is the finality requirement of 28 U.S.C. sec. 1258 satisfied, for only that would be the "final word of the final Court". *See*, *Posadas de Puerto Rico* v. *Tourism Company*, 478 U.S. 328, 338 (1986).

Despite the discussion above, petitioners contend, without much argument, that "the judgment issued by the court below

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[6] A certified translation of this case is included in the Appendix.

[7] Although Puerto Rico's Judicial Code was recently amended to add a new intermediate court, *see* n. 2, *supra*, the provision giving this new Court jurisdiction to review final judgments of the Superior Court has yet to take effect. *See*, Art. 9, Act 21 of July 13, 1992. Hence, final judgments of the Superior Court continue to be reviewed by the Supreme Court of Puerto Rico through appeals or writ of review. P.R. Laws Ann. T. 4., § 37(a)(b) (1980).

is a 'final judgment' reviewable by this Court". Pet. at 2. For this proposition, petitioners cite *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

In *Cox*, this Court recognized that there are four categories of cases in which a judgment is considered final within 28 U.S.C. sec. 1257 even though further state court proceedings are anticipated. *Id* at 477-486. Without much discussion, petitioners state that this case falls within categories one, two and four of *Cox*. Pet. at 2, n.2. Reliance on *Cox* in this case, however is completely inappropriate. This Court made clear in *Cox* that the narrow exceptions recognized in the case apply only when the highest State Court has *finally decided* the federal issue present in the case. Thus, in referring to all of these exceptions, this Court states:

> [T]he Court has recurringly encountered situations *in which the highest Court of a State has finally determined the federal issue present in a particular case*, but in which there are further proceedings in the lower state courts to come.

Id. at 477 (emphasis added). Furthermore, in discussing each of the four categories, this Court reiterates the need for a final determination of the federal issue by the highest court of the State before the final judgment requirement of section 28 U.S.C. sec. 1257 is met:

> In the first category are those cases in which there are further proceedings — even entire trials — yet to occur in the state court but where for one reason or another *the federal issue is conclusive* . . .

Id. at 479 (emphasis added)

> Second, there are cases . . . in which the federal issue, *finally decided by the highest court in the State*, will

> survive and require decision regardless of the outcome of further state court proceedings.

Id. at 480 (emphasis added)

> In the third category are those situations *where the federal claim has been finally decided*, with further proceedings on the merits in the State courts to come . . .

Id. at 481 (emphasis added)

> Lastly, there are those situations *where the federal issue has been finally decided in the State Courts* with further proceedings pending . . .

Id. at 482 (emphasis added).

Indeed, in later cases discussing or applying the four categories recognized in *Cox*, this Court has continued to emphasize the absolute need for a consideration on the merits and a final decision of the federal issue present in the case, by the highest court of the state. *See e.g. Asarco Inc.* v. *Kadish*, 490 U.S. 605, 611-612 (1989); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 54-57 (1989); *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 306-307 (1989); *Goodyear Atomic Corporation* v. *Miller*, 486 U.S. 174, 178-180 (1988); *First English Evan. Luth. Church* v. *Los Angeles County*, 482 U.S. 304, 309, n.3 (1987); *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 46 (1987); *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-7 (1984); *Flynt* v. *Ohio*, 451 U.S. 619, 620-623 (1981).

This absolute requirement of final determination of the federal issue is, of course, not present in this case. As stated earlier, the resolutions brought for review to this Court in this case are nothing more than a denial by the Supreme Court of Puerto Rico to review through certiorari, at that particular

moment, an interlocutory decision of the trial court not to dismiss the case.

In their petition, petitioners make a wrong statement regarding the meaning or the consequences of this denial by the Supreme Court of Puerto Rico. They state:

> As a result, the Supreme Court of Puerto Rico has implicitly recognized the respondents a cause of action for both libel and invasion of privacy. It has sanctioned the view that the First Amendment requirement that a publication be "of and concerning the plaintiff", as an element of a cause of action for libel or invasion of privacy, is not applicable to a plaintiff who is a "private" individual, even if the news items pertain to a matter of legitimate public interest.

Pet. at 6-7.

This statement is clearly incorrect. On June 17, 1992, less than a year before the petition in this case was filed, the Supreme Court of Puerto Rico reiterated a well established doctrine on the meaning or consequence of a denial of a writ of certiorari to review an interlocutory matter. In *Sociedad Legal de Gananciales* v. *Pauneto Rivera*, 92 JTS 78, p. 9593, the Supreme Court of Puerto Rico stated:

> It is a well-known fact that this Court's refusal to issue a writ of certiorari *does not mean that the Court has assumed a position with regard to the merits of the cause before its consideration*. In other words, a ruling by this Court denying a petition for certiorari *does not implicitly resolve* any matter against the petitioner for purposes of *res judicata*. The denial is simply representative of the discretionary power of this Court to refuse to review, at a given moment, a ruling issued by a court of first instance. See Rule 21 of the Supreme Court (4 L.P.R.A.

App. I-A). See also: *Heirs of Andrades* v. *Sosa*, 45 P.R.R. 710 (1933); and *Hughes Tool Co.* v. *T.W.A.*, 409 US 363 (1973).

Id. at 9596 (emphasis added) (see App. at 17-18)[8]. It is thus clear that, contrary to petitioners' contention, the denial of the petition for certiorari by the Supreme Court of Puerto Rico does not imply that Court's position regarding the merits of their federal defense nor does it "implicity" resolve anything regarding the merits of the case.[9] The Supreme Court of Puerto Rico simply exercised its discretion of not reviewing this interlocutory matter at that stage of the proceedings.[10] Hence, there is no doubt that the Supreme Court of Puerto Rico has not finally decided the federal question that petitioners present to this Court in this petition.

In sum, it is absolutely beyond dispute that this Court lacks jurisdiction in this case. 28 U.S.C. sec. 1258 limits review by this Court to "final judgment or decrees of the Supreme Court of Puerto Rico". The resolutions presented for review to this Court in this petition do not constitute a final judgment or decree of the Supreme Court of Puerto Rico for, as shown above, there are several substantive proceedings still pending

[8] The procedural history of *Sociedad Legal de Gananciales* v. *Pauneto Rivera* is similar to that in this case. There, as here, defendants had filed a motion to dismiss that had been denied by the trial court. Defendants in *Sociedad Legal de Gananciales* sought review through certiorari of this denial before the Supreme Court of Puerto Rico. The Supreme Court, as here, denied the certiorari. The case eventually returned to the Supreme Court of Puerto Rico and one of the controversies presented was the consequence or meaning of the original denial.

[9] This Court holds a similar view regarding the meaning of a denial of a petition for certiorari. *See e.g.*, *Hathorn* v. *Lovorn*, 457 U.S. 255, 262, n.11 (1982); *Hughes Tool Co.* v. *T.W.A., Inc.*, 409 U.S. 363, 366, n.1. (1973) (It is "well settled . . . that a denial of certiorari imparts no implication or inference concerning the court's view of the merits").

[10] Indeed, the fact that, in denying the certiorari, the Supreme Court of Puerto Rico added the phrase "in this stage of the proceedings", *see*, App. to Pet., at 16, although unnecessary to reach this conclusion, certainly supports it.

or available in the courts of the Commonwealth of Puerto Rico. Moreover, the narrow exceptions to the finality requirement recognized in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975) are inapplicable here because the federal issue presented in this petition has not been finally decided by the Supreme Court of Puerto Rico.

IV. Conclusion

For the reasons presented in this brief, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JORGE E. PEREZ
P.O. Box 191746
San Juan, PR 00919-1746
(809) 793-4998
Counsel for Respondents

May 17, 1993.

APPENDIX A

ESTADO LIBRE ASOCIADO DE PUERTO RICO
TRIBUNAL SUPREMO
SECRETARIA
NEGOCIADO DE TRADUCCIONES
APARTADO 2392
SAN JUAN, PUERTO RICO 00902-2392

CERTIFICATE OF TRANSLATION

This is to certify that the attached translation of the Opinion rendered by this Court on June 17, 1992, Case No. RE-88-181, Conjugal Partnership constituted by Nunez Borges and Huergo Menendez v. Pauneto Rivera and his wife, etc. --- ---------- made by the Bureau of Translations of the Supreme Court of Puerto Rico, is an accurate rendition into the English language of the original Spanish.

s/Olga A. Lasa Delgado
Olga A. Lasa Delgado, Director
Bureau of Translations
Supreme Court of Puerto Rico

CHIEF CLERK'S CERTIFICATE

I, Francisco R. Agrait-Llado, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation of the Opinion rendered by this Court on June 17, 1992, Case No. RE-88-181, Conjugal Partnership constituted by Nunez Borges and Huergo Menendez v. Pauneto Rivera and his wife, etc., ---------- made by the Bureau of Translations of this Court under the

authority of Act No. 87 of May 31, 1972, the original of which in Spanish is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon collection of the appropriate fees, I issue these presents under my hand and seal of this Court in San Juan, Puerto Rico, this 10th day of May, 1993.

s/Francisco R. Agrait-Llado

Francisco R. Agrait-Llado
Chief Clerk
Supreme Court of Puerto Rico

[seal]

[stamp]

(TRANSLATION)

IN THE SUPREME COURT OF PUERTO RICO

No. RE-88-181

Conjugal Partnership constituted by
Ivan Nunez Borges and Margarita Huergo Menendez,
and each one individually,

Plaintiffs and appellees

v.

Edwin Pauneto Rivera, his wife Laura Cosme de Pauneto,
and the Conjugal Partnership constituted by both,

Defendants, counterclaimants, and appellants.

REVIEW

JUSTICE REBOLLO LOPEZ delivered the opinion of the Court. San Juan, Puerto Rico, June 17, 1992.

The facts relevant to the correct adjudication of this petition, as they come forth, first and foremost, from the decision of this Court in *Pauneto* v. *Nunez*, 115 D.P.R. 591 (1984), are the following:

By contract dated July 30, 1974, Edwin Pauneto Rivera and his wife leased *some business premises* belonging to them and located in Levittown, Toa Baja, Puerto Rico, to Ivan Nunez Borges who was married to Margarita Huergo. While the lease was still in force, Nunez Borges made certain alterations that

damaged the building structure and, on the expiration of the contract, left the premises without paying some rents.

Pauneto Rivera and his wife sued Nunez Borges in the District Court of Puerto Rico, Toa Alta Part, seeking overdue and uncollected rents and compensation for the damage sustained as a result of the alterations to the structure. Neither Nunez Borges's wife nor the conjugal partnership constituted by them was joined as defendant.

The court rendered judgment against Nunez Borges and ordered him to pay Pauneto Rivera and his wife $15,000 in property damages, $400 in overdue rents, $4,308 in uncollected rents, plus the costs, and $500 in attorney's fees. The judgment became final and unappealable.

Two years later, Pauneto Rivera and his wife moved the District Court *under Civil Procedure Rule 51.7* to summons Margarita Huergo — Nunez Borges's wife — and the conjugal partnership constituted by them, to show cause why they should not be bound by the judgment in the same manner as if they had been originally sued. The District Court denied the petition and Pauneto Rivera sought review in the Superior Court, Bayamon Part. The Superior Court reversed the judgment and ruled that Rule 51.7 was applicable to the case at bar.

Nunez Borges sought review before this Court. We agreed to review and issued a show cause order. While Nunez Borges's petition for review was pending before the Court, *Pauneto Rivera entered in the Registry of the Property an [order for the] attachment of a real property belonging to Nunez Borges and his wife, that is, to the conjugal partnership constituted by them.*

When we reversed the ruling of the Superior Court in an Opinion issued *at the time*, we held that two requirements must be met when invoking Rule 51.7: "(1) previous joint liability arising from a contractual 'obligation'; and (2) that the persons against whom the Rule is invoked could have been sued and summoned when the action was filed." *Pauneto* v. *Nunez*, *supra*, at 596. With regard to the specific facts under

our consideration at the time, this Court concluded that Pauneto Rivera could not resort to the Rule 51.7 mechanism because "the joint liability bond as contemplated by said Rule [did] not exist a priori." *Id.* at 597.

At that point, Nunez Borges and his wife Margarita Huergo filed two actions in the Superior Court, Bayamon Part, against Pauneto Rivera and his wife. The first action sought to squash the attachment, which they believed was illegal, and the second action sought redress for the alleged damage sustained as a result of the unlawful attachment. Both actions were consolidated. *Codefendants Pauneto Rivera and his wife filed a counterclaim against the spouses Nunez-Huergo for the "subsidiary collection" of the judgment issued in the first action involving the parties.* Nunez Borges and his wife Margarita Huergo moved the court for the dismissal of the counterclaim. The trial court denied the motion. *Nunez Borges and his wife then filed a petition for certiorari with this Court. We denied the same.*

The spouses Nunez-Huergo then filed in the trial court a *second* motion to dismiss the counterclaim. This time, the court below granted the petition, and ruled that Pauneto's "counterclaim . . . only lies against Mr. Ivan Nunez Borges and not against the Conjugal Partnership constituted by him and his wife Margarita Huergo, . . . inasmuch as the judgment rendered by the District Court, Toa Alta Part, . . . was only directed against Mr. Ivan Nunez Borges. [Pauneto] had to exhaust the property of Mr. Nunez Borges in the previous action, which was not done, in order to properly include the Conjugal Partnership constituted by Nunez Borges and his wife, the defendants in the counterclaim in the above-captioned case." Exh. 1 of the Petition for Review.

Feeling aggrieved, Pauneto Rivera sought review of said judgment before this Court. He assigns three errors to the trial court:

Error No. 1: Refusing *sub-silentio* the "law of the case" argument raised with regard to the right of exhaustion in this action.

Error No. 2: Ruling that exhaustion of the property of coplaintiff Ivan Nunez Borges had to be made in the previous action, where he was ordered to compensate the Appellants.

Error No. 3: Failing to act on our alternative petition to join the appellees as third-party defendants. Petition for Review, at 3-4.

We issued the writ of review and decide as follows:

I

In the first place, we must determine whether *the trial court's denial* of the first motion to dismiss filed by Nunez Borges and his wife Margarita Huergo and *our denial of the petition for certiorari* filed by them, barred the trial court from subsequently granting the spouses Nunez-Huergo's second motion to dismiss. In other words, if the first denial became "law of the case" governing the issue raised here and precluding further review by the trial court.

In common law, "[i]n the absence of statute the phrase, *law of the case*, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). More than an unchanging, inflexible rule of law, the doctrine incorporates a desirable practice: the controversies of a cause heard, litigated and decided by a court, should ordinarily be deemed final. Thus, the parties to an action may, as far as possible, have reliable guidance

on how to conduct their affairs. *Dictograph Products Company* v. *Sonotone Corporation*, 230 F.2d 131, 135 (1956).

It is well known that "[i]n Puerto Rico, there does not exist a valid ground for the application of the law of the case . . . in the Anglo-American manner. . . . This matter is governed here, of course by the Civil Code." *Torres Cruz* v. *Municipio de San Juan*, 103 D.P.R. 217, 222 (1975). The practice approved by this Court, however, does not depart from the rules adopted by any advanced legal system. "[I]n order to watch for the orderly and speedy prosecution of the litigations, as well as for the stability and certainty of the law, a trial court should not resist itself to alter its pronouncements within the same case except when it is convinced that the same are erroneous. This is a matter of sound practice . . . and not an inviolable rule." *Id.* It is precisely because this principle does not constitute a steadfast rule or a bar to the power of the courts that in *Torres Cruz* we allowed a second judge to reverse the erred decision of a first judge of equal rank within the same case.

In view of the above, and despite the fact that we believe that courts of first instance must do an all-out effort to prevent contradictory and inconsistent rulings, in principle, there is no absolute legal bar precluding the court below in this case from reconsidering, so to speak, its original interlocutory decision or from granting the second motion to dismiss filed with said court by the spouses Nunez-Huergo.

On the other hand, the fact that this Court had denied the spouses Nunez-Huergo's petition for certiorari seeking review of the original denial of the court below does not affect the correctness of the subsequent action of said court granting the second motion to dismiss. It is a well-known fact that this Court's refusal to issue a writ of certiorari does not mean that the Court has assumed a position with regard to the merits of the cause before its consideration. In other words, a ruling by this Court denying a petition for certiorari does not implicitly resolve any matter against the petitioner for pur-

poses of *res judicata*. The denial is simply representative of the discretionary power of this Court to refuse to review, at a moment, a ruling issued by a court of first instance. See Rule 21 of the Supreme Court (4 L.P.R.A. App. I-A). See also: *Heirs of Andrades* v. *Sosa*, 45 P.R.R. 710 (1933), and *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363 (1973).

II

Consequently, we must decide whether the dismissal of the trial court — granting the second motion to dismiss — was proper at law.

The first ground adduced by the trial court to dismiss the counterclaim filed by Pauneto Rivera and his wife was that their "counterclaim ... only lies against Mr. Ivan Nunez Borges and not against the Conjugal Partnership constituted by him and his wife Margarita Huergo, ... inasmuch as the judgment rendered by the District Court, Toa Alta Part, ... was only directed against Mr. Ivan Nunez Borges." Exh. 1 of the Petition for Review. This reasoning, however, does not take into consideration the fact that Pauneto's counterclaim actually seeks to make the conjugal partnership constituted by Nunez and Huergo *secondarily* liable for the acts committed by one of its members — Ivan Nunez — under Civil Code sec. 1310, which provides that:

> **Section 3663. Debts contracted before marriage; fines**
>
> The payment of debts contracted by the husband or by the wife, before marriage, shall not be borne by the partnership.
>
> *Neither shall it bear the payment of fines or of pecuniary condemnations which may be imposed on either of them.*

However, the payment of debts contracted by the husband or by the wife, prior to the marriage, and that of fines and condemnations imposed on either of them, *may be claimed against the partnership property, after covering the expenses, mentioned in section 3661 of this title, if the debtor spouse should have no private capital, or were it insufficient;* but at the time of the liquidation of the partnership the payments, made for the specified causes, shall be charged to said spouse. 31 L.P.R.A. sec. 3663 (Emphasis supplied.)

In *Lugo Montalvo* v. *Gonzalez Manon*, 104 D.P.R. 372 (1975), we construed the *second paragraph* of sec. 1310 — that is, "the meaning of 'fines' and, particularly . . . what constitutes 'pecuniary condemnations' " (*id.* at 374) — and stated that:

> It seems evident, then, that the doctrine understands, quite rightfully in our opinion, that when the fine or penalty is produced by the commission of an offense, as a general rule — since there are exceptions, as we have seen — the liability is something personal of the spouse who committed it: *but in the cases of extracontractual civil liability, the liability shall be personal or of the community according to the facts which gave rise to it.* It is generally recognized that if the husband's action or enterprise produces financial benefits to the bulk of the community property, the liability shall also fall upon said property. As Scaevola states, "he who expects profits, should also expect losses," principle which in his opinion has been governing in matters of partnership from time immemorial. *Id.* at 378. (Emphasis supplied.)

The "obligation or liability" arising from the contract signed by the spouses Pauneto-Cosme and Nunez Borges — established in the original action between the parties — had all the "characteristics" appertaining to a "conjugal partner-

ship liability," inasmuch as it originated in a business transaction involving Nunez Borges which, in all probability, benefitted the conjugal partnership constituted by him and his wife, Margarita Huergo. *W.R.C. Props., Inc.* v. *Santana*, 116 D.P.R. ~~127,~~ 135 (1985). This fact, however, is *totally irrelevant* for two reasons: Margarita Huergo, Nunez Borges's wife, did not take part in the lease, and Pauneto Rivera and his wife *only sued* Nunez Borges. Consequently, *judgment was rendered only against the latter*.

Although this is correct, we *cannot* lose sight of the fact that Pauneto Rivera and his wife *allege* in their counterclaim that Nunez Borges does not presently have any property against which to enforce the judgment rendered by the District Court, Toa Baja Part, but that the conjugal partnership has enough. Thus, they pray the Superior Court, Bayamon Part, to "declare that the separate property of coplaintiff Nunez has been duly exhausted" and to proceed to enforce the above-mentioned judgment against the conjugal partnership constituted by the spouses Nunez-Huergo. Exh. 9 of the Petition for Review, at 23.

In view of these allegations and of the sec. 1310 subsidiary cause of action against the community property of the conjugal partnership constituted by the plaintiffs, the legality of the counterclaim filed by the spouses Pauneto-Rivera seems, *at first sight*, unquestionable. "[T]he conjugal partnership," according to Manresa, "is not liable for the payment, but there are legitimate interests at stake, creditors that must not lose their credits, torts, wrongs or injuries that must be redressed; and when the debtor spouse does not have separate property and there is an excess of community property, the law provides that compensation or redress be had against the conjugal partnership." J.M. Manresa y Navarro, IX-1 *Comentarios al Codigo Civil espanol* 626, Madrid, Reus (rev. 5th ed. 1950).

The trial court further reasoned that Pauneto Rivera "had to exhaust the property of Mr. Nunez Borges in the previous

action, which was not done, in order to properly include the Conjugal Partnership constituted by Nunez Borges and his wife, the defendants in the counterclaim in the above-captioned case." Exh. 1 of the Petition for Review. *From the outset*, we should point out that this pronouncement *correctly recognizes* that, pursuant to Civil Code sec. 1310, before recovering from the community property, it must be established that the liable spouse does not have assets or that said assets are insufficient, and that the conjugal partnership has the assets to satisfy the obligations. *Cruz Viera* v. *Registrador*, 118 D.P.R. 911 (1987). There is no doubt, *on the other hand*, in view of our decision in *Cruz Viera*, that the entry in the Registry of Property of an [order for the] attachment of a real property belonging to the spouses Nunez-Huergo was void and illegal. *Cruz Viera* v. *Registrador*, *supra*, at 916.

However, in our opinion, nothing in this case bars the *very* Superior Court, Bayamon Part, from *adjudicating* in a *single* action *not only* the claim for the damage, if any, sustained by the spouses Nunez-Huergo as a result of the attachment, *but also* the legality of the action; and from conducting the exhaustion and recovery proceedings against the community property under Civil Code sec. 1310. This course of action is advisable in order to secure the "just, speedy and inexpensive determination" of the issues raised here. See Civil Procedure Rule 1 of 1979 (32 L.P.R.A. App. III).

Consequently, *the judgment appealed is reversed and the case remanded to the trial court for further proceedings consistent with this opinion.*[1] *Judgment will be rendered accordingly.*

Justices Negron Garcia and Hernandez Denton concur in the result without a written opinion.

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[1] In view of our decision we need not pass upon the third assignment of error.